No. 14535

In the United States Court of Appeals for the Ninth Circuit

KRIS PETROLEUM, LTD., a Corporation, and KRIS PETROLEUMS (Washington), Inc., A Corporation
Appellants

vs.

WESLEY STODDARD, LITTLE VALLEY OIL CO., A Corporation
and
TED ERDMANN (Intervenor)
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Chief Judge*

BRIEF OF APPELLANTS

GRAHAM K. BETTS,
GEORGE N. LUSCH,
Attorneys for Appellants.

Beyers Building
Seattle 6, Washington

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JURISDICTION

This is an appeal from an order of the U. S. District Court for the Western District of Washington, Northern Division, permitting Intervention (R-42). It is contended that the District Court was without jurisdiction to make the Order Permitting Intervention.

Jurisdiction of this court is found in 28 USCA 1291 and in Federal Court Rules 73 and 75 and Appellants' Notice of Appeal (R-55), Bond on Appeal

(R-58), and Statement of points to be relied upon (R-64), all filed in compliance with said rules.

The main action in which the Appellee (Erdmann) seeks to intervene is an action brought by the Plaintiff Stoddard, the additional Plaintiff, Little Valley Oil Company having been later impleaded, to foreclose two liens for labor and material allegedly furnished to the Defendants (Appellants) by the Plaintiff. The action commenced in the State Court was removed to the District Court on diversity of citizenship.

The allegations of the original Application by Appellee Erdmann, to Intervene (R-18, 19) claims a lien allegedly on the same property involved in the main action, which, if true, could create a common question of law or fact vesting the District Court with jurisdiction sufficient to pass upon the Application to Intervene (Rule 24 (b) (2)). These allegations are likewise contained in the Complaint in Intervention (R 37-42), but where, as here, it appears on the face of the record that the same property is not involved in the two actions (compare liens of Plaintiff R-13 and R-15 with lien of Intervenor (R-41) and where—as here—other jurisdictional requirements are absent (amount involved is $1,603.04, R-40), and diversity of citizenship is not shown, the District Court is without jurisdiction to entertain the Intervention and the Application must be denied.

Since the District Court was without jurisdiction and departed from the prescribed rules, the Appellants have appealed. The Intervention should be denied.

STATEMENT OF PLEADINGS

The main action originally commenced in the Superior Court of the State of Washington by the sole Plaintiff Wesley Stoddard and was removed to the U. S. District Court on Diversity of Citizenship, where on Motion of Defendants, the Little Valley Oil Company was joined therein as party Plaintiff.

The Amended Complaint of Plaintiffs Stoddard and Little Valley Oil Company states two causes of action upon labor and material liens, seeking foreclosure thereof, and a third cause of action upon an open account and praying judgment therefor (R 3-10). The two liens attached to the Plaintiff's Amended Complaint and marked Exhibit "C" (R-13) and Exhibit "E" (R-15) describe the property covered as

> "The N. E. 1/4 of the S. E. 1/4 of Section thirty-one (31) Township 41, Range 3 E of W.M." (R-13).

and

> "Township forty (40), Range (3) three E. of W.M.; Township forty (40), Range two (2) E. of W.M.; Township forty-one (41), Range two (2) E. of W.M." (R-15).

The Intervenor, Ted Erdmann, Appellee herein,

filed his original Application to Intervene on July 14, 1954, (R-18) noting the same for hearing July 27, 1954 (R-17). This Notice and Application were not accompanied by any pleading as required by Rule 24 (c). In response to this Notice and Application the Defendants did file their written Motion to Dismiss (Objections) (R20-25) all of which was argued to the Court on July 27, 1954.

After argument, it appearing that the Application to Intervene was defective, the Court of its own motion continued the matter to July 30, 1954; shortening time for service and directing proper procedure by the Intervenor. (Minute entry R-25).

At the time of hearing on July 30, the Intervenor filed his "Motion to Intervene" (R-31) which was by the Court, over Defendants' objection directed to be marked "Amended" (R-31) accompanied by his Complaint seeking to foreclose a labor lien for $1,-603.04 (R 37-41), to which Complaint is attached as Exhibit "A" his lien for labor covering property described as the.

> "N.W. 1/4 of the S.W. 1/4 of Section thirty-two (32) Township forty-one (41) North of Range three (3) E.W.M." (R-41).

which is not the same property against which foreclosure is sought in the main action.

To all of this the Defendants filed their written Re-

ply (Objections) (R 33-41), upon grounds previously stated at the hearing on July 27 (R 20-25), and upon the jurisdictional grounds that the amount involved is less than $3,000.00, to-wit $1,603.04, and that there is no Diversity of Citizenship between the Intervenor and the Defendants, Appellants.

After the order allowing Intervention (R-42), the Defendants, Appellants, filed their Motion to Dismiss the Complaint in Intervention (R 45-51), upon the grounds previously urged as Objections to the Application for Intervention, and upon the further ground that the Intervenor's action to foreclose his alleged lien was not commenced within the time limited or prescribed therefore by Washington Statutes (R.C.W. 60.04.100). This Motion was likewise denied (R-52).

STATEMENT OF CASE

The questions involved in this Appeal relate to lack of jurisdiction of the District Court in the following particulars:

First: The jurisdictional amount of $3,000.00 not involved—($1,603.04);

Second: Diversity of Citizenship is not shown;

Third: Procedural matters not permitted by, and contrary to District Court Rules as follows:

a. The original Application to Intervene, ab-

sent a Complaint, failed to comply with Rule 24 (c).

b. The allowance of time, or continuance granted on the Court's Motion, to enable the Intervenor to properly come before the Court is without support in any rule and could not toll the statute limiting the time within which a foreclosure could be commenced.

c. The failure to file a Complaint with the original Application to Intervene resulted in the commencement of no action as provided by Rule 3, hence the filing of the Complaint in Intervention on July 30 could not relate back to the date of filing the original Application (July 14, 1954) to give the District Court jurisdiction even if other jurisdictional requirements could be met.

d. The July 30 filing did not comply with the Statutory Limitation of eight (8) months within which to commence a lien foreclosure, and there has never been the "commencement" of any action by the Intervenor as required by state law governing lien foreclosure.

The alleged errors were all properly preserved for Appeal by timely Objections, Motions to Dismiss and Exceptions to the Court's Rulings as hereinbefore set out.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The District Court erred in assuming jurisdiction

of the Complaint in Intervention because of:

a. Lack of Jurisdictional Amount;

b. Lack of Diversity of Citizenship;

c. No Common Question of Law or Fact;

d. Not the same property involved in main action;

e. Lien foreclosure period had expired when complaint was filed.

2. The District Court erred in entertaining jurisdiction to hear and determine the Application for Intervention because:

a. The Application was not accompanied by any Complaint as provided by Rule 24 (c);

b. The Application shows no right of intervention as provided by Rule 24 (a);

c. The Application shows no ground for permissive intervention as provided by Rule 24 (b).

3. The District Court erred in granting the continuance after argument of July 27, because:

a. The Application to Intervene being then unaccompanied by a Complaint presented nothing for the Court to determine or continue.

b. The subsequent filing of a Complaint could not relate back to the date of filing the original application since the subsequent Complaint

was an original proceeding unrelated to any prior pleading, thus no action was commenced within the time limited by law.

4. The District Court erred in permitting Intervention because it appeared on the face of the record—timely called to the attention of the Court—that the District Court was without jurisdiction in the several particulars enumerated.

SUMMARY OF ARGUMENT

It is the contention of the Appellants that a complaint in intervention is an original action and as such must affirmatively show all jurisdictional requirements requisite to an original action in a United States Court. The lack of such a showing vests no jurisdiction and the court cannot further entertain the matter.

The order is an appealable order for lack of jurisdiction of the District Court to make it, by reason of insufficiency of the complaint to allege jurisdictional facts and because it affirmatively appears that the cause of action alleged no longer existed when the Complaint in Intervention was filed July 30, 1954.

AN APPEALABLE ORDER

The District Court was without jurisdiction to make the order appealed from and for that reason alone it is an Appealable Order and reviewable.

The Order of July 30, 1954, Permitting Intervention (R-42) is an Order Finally Determining the Existence of a Lien and is a Final Appealable Order which determines the very existence of the alleged cause of action in favor of the Intervenor.

The lien had expired at the time of the Order Permitting Intervention July 30, 1954 (R-42) and at the time of filing of the Complaint in Intervention July 30, 1954 (R 37-42).

The District Court was without jurisdiction to make the order appealed from, regardless of the finality of the order, and for that reason alone it is reviewable.

As to the right of appeal from an Interlocutory Order, the Supreme Court said in *Phillips v. Negley,* 117 U.S. 655:

> *"If* on the other hand, *the order made was made without jurisdiction of the Court making it, then it is a proceeding which must be the subject of review by an appellate court."* page 672. (emphasis ours)

In *U.S. Ex rel Tungsten R. Mines Co. v. Ickes,* 84 Fed.(2d) 257 (App D.C.), the Plaintiff-Relator—appealed from an interlocutory order. The Defendant-Respondent—Secretary of Interior—sought dismissal of the appeal *"because the order appealed from is interlocutory"*

The Court said:

> "As to this, we have said many times that an appeal of right does not lie from an interlocutory order . . . But the rule is subject to this exception: If the decree appealed from was made without jurisdiction on the part of the Court making it, then *it is a proceeding which may be*—or as the Supreme Court said *must be —the subject of review by an Appellate Court.* . . . In this view *the question is not whether the Order is final or interlocutory, but whether the Court exceeded its power in entering it.*" Page 259. (Emphasis ours)

Where an impleaded party was not indispensable to the suit and when the joinder would oust the federal court of jurisdiction because of lack of diversity of citizenship, this court has held it an abuse of discretion to require such party to be joined and therefore appealable.

Rose v. Saunders, 69 Fed(2nd) 339 (CCA9)

NO PLEADING

Motion to Intervene must be accompanied by a Pleading (Rule 24-c). An action is commenced, and only commenced "When a Complaint is filed," (Rule 3). "A civil action is commenced by filing a complaint with the Court."

"An Intervention is for all intents and purposes an original party." *In re Raabe, Glissman & Co.*, Inc., 71 Fed Supp 678, 690 (D.C. N.Y.)

In *Miami County National Bank of Paola, Kansas v. Bancroft,* 121 F(2nd) 921 (CCA. 10) 925, 926, the Court said:

> "The Motion for Intervention must state the grounds therefor and shall be accompanied by a pleading setting forth the claims or defense upon which intervention is sought. . . . The purpose of the rule . . . is to enable the Court to determine whether the applicant has the right to intervene, and, if not, whether permissive intervention should be granted."

The purpose of the rule, 24 (c), is not only to inform the Court of the grounds upon which intervention is sought, but also to inform parties against whom some right is asserted or relief sought, *so they may be heard before the Court passes on the Application.*

> *International Brotherhood Teamsters v. Keystone Freight Lines,* 123 Fed. Supp.(2nd), 326 (C.C.A. 10)

Court and litigants must follow federal rules of civil procedure in the same manner as they must obey a statute.

> *Beasley v. U.S.,* 81 Fed Supp 518 (D.C. S.C.)

In *Mullins v. DeSoto Securities Co.,* 2FRD 502 (D.C. La.) where applicants adopted Plaintiff's allegations, the Court held such adoption insufficient, saying:

> "There is no distinct pleading setting forth the

claims for which intervention is sought. This is another good and separate reason to deny intervention." P. 507.

Since an intervenor in an action or proceeding is for all intents and purposes, an original party — *In re Raabe, Glissman & Company, Inc.,* 71 Fed Supp 678, 680, the necessity for compliance with Rule 24 (c) is at once apparent because, absent a Complaint, the Court is without any means of determining whether an applicant for intervention has a right thereto, as provided by Rule 24 (a), or whether there is a permissible intervention by reason of Rule 24 (b), in regard to which the Court can exercise any discretion.

It necessarily follows that on July 27 there was nothing for the court to pass upon, nothing which the court could continue, and nothing which could be amended either with or without the direction of the court. Hence, there was nothing upon which the court's order of that date (Minute entry R-25, 26) could operate.

NO JURISDICTIONAL AMOUNT

There is insufficient jurisdictional amount involved. The Intervenor sues for $1,603.04. (Complaint in Intervention R-38, 39, 40).

It is essential to the court's jurisdiction that it appear from the face of the Intervention Complaint that the amount of more than $3,000.00 is involved, a

lien foreclosure not being within any of the statutory actions granted jurisdiction irrespective of the amount in controversy.

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount"; *Pinel v. Pinel,* 240 U.S. 594, 596.

The allegation of paragraph 3 of the Complaint in Intervention is that the defendants are indebted to the plaintiff in the sum of $1,603.04 which is far short of the jurisdictional requirement.

The Intervenor cannot avail himself of the amount of the Plaintiffs' claim to sustain jurisdiction of the court as to his own separate individual claim.

In *Hackner v. Guaranty Trust Co.* of New York, 117 Fed (2nd) 95 (C.C.A. 2) several parties having separate claims joined in one action to attain the jurisdictional amount, none of whom individually could justify jurisdiction. Subsequently, an attempt was made to join additional parties who, it was alleged, could individually justify the jurisdictional amount, one of whom (York) had not been injured but if she had been, she would have been injured only in the amount of $3,000.00 and one of whom (Eastman) had been injured in a sum greater than $3,000.00. The Court said:

> "As to York, there cannot exist jurisdiction any

> more than as to the original plaintiffs, and it cannot be supplied for her or for them by adding a plaintiff who can show jurisdiction." P. 98.

In *Reppel v. Board of Liquidation et al,* 11 Fed Supp 799 (D.C. La.) a Statutory 3-Judge Court, speaking of a motion to dismiss a bill in intervention said:

> "As to the amount involved, the trustees of the Hersheim fund, having been permitted to intervene, must be considered the same as an original plaintiff." P. 802

and since

> "The amount in controversy between one of the plaintiffs, and . . . the appellees, is admitted to be only . . . about $1,000.00 and the court below, properly dismissed the bill as to her, for want of jurisdiction." *Weems et al v. Carter et al,* 30 Fed(2nd) 202, 204 (CCA 4)

It being the case law that, first, an intervenor comes into an action as an original party; and second, that separate claims cannot be joined to attain the jurisdictional amount, the courts jurisdiction of the complaint in intervention did not attach upon the filing thereof, it appearing on its face that the amount involved is less than $3,000.00, the District Court was without jurisdiction.

NO DIVERSITY OF CITIZENSHIP

Nowhere in the Intervention Complaint (R 37-42)

or in the Application to Intervene (R 18-19) or in the Motion to Intervene (R 31) is the Citizenship of either the Intervenor or defendants, appellants, alleged, as required.

The Supreme Court in *Mansfield, Coldwater & Lake Michigan Railway Company and Another v. Swan and Another,* 111 U.S. 379 said, page 382:

> "And according to the uniform decisions of this court, the jurisdiction of the Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record."

Search as we might the record in this intervention, we cannot find such affirmative showing anywhere in the record, and further, we could not find such a showing by any implication.

For the dual want of jurisdictional amount and diversity of citizenship, the court not only abused its discretion but also exceeded its jurisdiction in granting this Motion to Intervene.

NO EXISTING LIEN

As heretofore pointed out the lien claim of the Intervenor (R 41) describes property different from that described in his Complaint in Intervention. Intervenor's lien is fatally defective as to jurisdiction. He seems to have adopted the plaintiffs' description by the allegations of Paragraph I of his Answer to

Plaintiffs' complaint (R 37) and by Paragraph II of his cross-complaint (R 37-38). This is an acknowledgment that his description contained in the lien is incorrect, in which event his lien is fatally defective. We quote from *The Mount Tacoma Manufacturing Company v. August Cultum et al,* 5 Wash. 294, a lien foreclosure action:

> "The only logical theory upon which this action can be sustained is the theory that there is no virtue whatever in the description of a lien notice, for there is nothing in this notice to lead one to the premises sought to be foreclosed, but everything to lead them in another direction. It is not a case of insufficiency of description, but the statement in the lien notice flatly contradicts the statement of the complaint. No reconciliation is possible." P. 295.

Even if the Intervenor's lien had properly described the property, then, nevertheless there can be no lien foreclosure in behalf of Intervenor since it appears of record that the Intervenor's lien was extinguished by lapse of time prior to the filing of Intervenor's Complaint in Intervention.

The Washington Law RCW 60.04.100 provides:

> "*No lien* created by this Chapter *binds the property* subject to the lien *for a longer period* than (8) *calendar months* after the claim was filed, unless an action is commenced within that time to enforce it."

The record discloses that the Intervenor's Lien Claim was filed on November 17, 1953, (R 38) and Complaint in Intervention was not filed until July 30, 1954 (R 42) being more than eight months.

In *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, the Supreme Court—in ruling on the applicability of Rule 3, as against the State of Kansas statute relative to the Commencement of an Action, held the State Statute governed because:

> "Since the cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in federal court as in the state court. . . . It accrues and comes to an end when local law so declares. . . . Where local law qualifies or abridges it, the federal court must follow suit." P. 533.

Local law requires the commencement of a lien foreclosure action to be by service upon the necessary parties to its maintenance within eight calendar months of its filing, R.C.W. 60.04.100.

> "It follows that personal service must be made upon, or service by publication must be commenced against, such necessary parties within eight months after the lien is filed, else the court acquires no jurisdiction to enforce the lien." *City Sash and Door Company v. Bunn*, 90 Wash. 669, 675.

No such personal service was had and this defect was properly brought before the District Court by the appellants objections filed July 24 (R 20-25) argued July 27 (R 25), (minute entry) by their objections filed July 29 (R 28-30) argued July 30 (R 42), (Order Permitting Intervention) and by their Motion to Dismiss filed August 18 (R 45-51), argued August 27 (R 52), (Order denying Motion to Dismiss).

Considering this case law it is immediately clear that the District Court has wrongfully assumed jurisdiction of an action, if otherwise properly brought, which by law had become non-existent.

Since there has been no service upon any defendant as required by local law, Rule 3 must give way, and even if jurisdictional facts could be pleaded, and the theory of relation back could be indulged in, there still would be nothing before the court for its determination.

CONCLUSION

It is respectfully urged that since the Appellee failed to comply with the rules by filing a Complaint in Intervention with his Application to Intervene, the District Court at that time obtained no jurisdiction, that his belated filing failing to state jurisdictional facts vested no jurisdiction; that the belated filing was not the "commencement" of lien foreclosure as declared by the statute creating it, and the lien having ceased to exist, the court in making the order permitting intervention had no jurisdiction to make it.

For these reasons the Order appealed from should be dismissed.

Respectfully submitted,

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